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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 842

GALEN L. TAIT, Collector of Internal Revenue,
Petitioner,

vs.

WESTERN MARYLAND RAILWAY COMPANY,
a Corporation.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF AMICUS CURIÆ.

John J. Finnorn,
Appearing as Amicus Curiæ.

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Opinions Below.

The opinion of the District Court for the District of Maryland (R. 38-45) is reported in 53 F. (2d) 211. The opinion of the Circuit Court of Appeals for the Fourth Circuit (R. 52-56) is reported in 62 F. (2d) 933.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered January 13, 1933 (R. 57). Petition for a writ of certiorari was filed April 7, 1933, and was granted April 24, 1933. The jurisdiction of this Court rests upon Section 240(*a*) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

This brief will discuss only one question:

Whether the defendant, Collector of Internal Revenue, was privy to an earlier judgment rendered by the Board of Tax Appeals in a proceeding between the plaintiff and the Commissioner of Internal Revenue, involving other tax years, which proceedings were commenced more than two years after the exaction now alleged to be illegal.

Statement.

This consolidated cause was brought in the District Court to recover alleged overpayments of income tax for the calendar years 1920 to 1925, inclusive.

The tax sought to be recovered amounted to $56,557.36 and was divided for the years, and in the amounts following, to-wit:

1920	$8,079.62
1921	8,079.62
1922	10,099.53
1923	10,099.53
1924	10,099.53
1925	10,099.53
Total (R. 24)	$56,557.36

Of the total amount of $56,557,36, set forth above, the amount of $8,079.62, applicable to the year 1921, was paid in four equal quarterly instalments, to-wit: On or about April 15, June 21, September 15 and December 15, 1922 (R. 36); and the amount of $10,099.53 for the year 1922 was paid in four equal instalments on March 15, June 16, September 24 and December 15, 1923 (R. 36).

On the trial of the cause the plaintiff submitted in evidence, as conclusive proof of certain facts, a certain judgment of the Circuit Court of Appeals for the Fourth Circuit, which reversed the judgment of the United States Board of Tax Appeals in a case brought by the plaintiff against the Commissioner of Internal Revenue. *Western Maryland Railway Company* v. *Commissioner,* 33 Fed. (2d) 695.

The Board of Tax Appeals was created by the Revenue Act of 1924, which was enacted and became effective June 2, 1924.

The prior suit, the judgment in which was submitted in evidence herein, was, of necessity, commenced after June 2, 1924, and was between the present plaintiff and the Commissioner of Internal Revenue.

The only question considered here is whether Galen L. Tait, the defendant Collector of Internal Revenue, was privy to the prior judgment and bound thereby.

Summary of Argument.

This Honorable Court has twice held that no privity existed between the Collector of Internal Revenue and the United States: *Sage* v. *United States,* 250 U. S. 33; 39 S. Ct. 415; 63 L. Ed. 828; or the Commissioner

of Internal Revenue, *Bankers' Pocahontas Coal Co.* v. *Burnett*, reported in the *Supreme Court Reporter* advance sheets of December 15, 1923, Vol. 53, page 150.

In each of these earlier cases the first suit was against the Collector. The court in the instant case attempts to hold that the rule laid down by this Honorable Court in the *Sage case* and in the *Bankers' Pocahontas Coal Company case* does not apply, simply because here the first suit was against the Commissioner of Internal Revenue.

It appears that the principles of the doctrine of *res judicata* have been confounded with the general principles of the law of agency, and that sight has been lost of the fundamental principles which underlie the right to maintain a cause of action against a collector of internal revenue in the first instance.

A suit against the Collector of Internal Revenue for the recovery of taxes illegally exacted by him is personal. *Sage* v. *United States*, 250 U. S. 33, 39 S. Ct. 415; 63 L. Ed. 828; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 51 S. Ct. 186, 75 L. Ed. 415; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, 42 S. Ct. 1, 66 L. Ed. 99; *Union Trust Co.* v. *Wardell*, 258 U. S. 637, 42 S. Ct. 393, 66 L. Ed. 753; *Bankers' Pocahontas Coal Co.* v. *Burnett*, *Supreme Court Reporter* advance sheets, December 15, 1932, Vol. 53, page 150; *Lederer* v. *McGarvey*, 271 U. S. 342, 46 S. Ct. 534, 70 L. Ed. 977.

The personal nature of a suit against a collector, in its final analysis, results from the fact that the scope of his authority is never merely apparent but is in all cases only real. He has such authority, and only such authority, as Congress by statutory enactment confers upon him. Congress prescribes the tax, which

it is his duty to collect; if he exacts more than is prescribed, he thereby transcends his authority, and in doing so, like any other agent who exceeds the scope of his authority, makes himself personally liable.

This fact and this fact alone can support the rule established by this Honorable Court in the cited cases.

The origin of suits against officers of the Government to recover for acts done by them in their official capacity, was considered by Mr. Everett P. Wheeler, in a brief filed, as amicus curiæ, in the case of *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, 39 S. Ct. 499, 58 L. Ed. 825, in which he wrote:

"The argument for the plaintiff in error in this case overlooks the origin of suits against officers of the Government to recover for acts done by them in their official capacity. The origin is that: At common law the maxim was that the King could do no wrong. It followed that no suit could be maintained against him. When, however, an officer of the King transcended his authority and did something to a citizen which was in violation of law, the benefit of this maxim was not extended to the officer. On the contrary, the courts were astute to protect the rights of the injured citizen and to assume that the illegal acts, while within the apparent scope of his authority, were not really authorized by the sovereign. Of this character is the following: *Hall* v. *Smith*, 2 Bing. 156, 9 J. B. Moore 266, 2 L. J. C. P. 113.

It commonly happened that, in such cases, the Government defended the suit and indemnified the officer whose acts were drawn in question; but this circumstance did not affect the theory of the suit. *De Lima* v. *Bidwell*, 182 U. S. 1, 177, 45 L. Ed. 1041, 1048, 21 S. Ct. 743.

The same rule was adopted by the United States as part of the common law which our ancestors brought to this country, and the exemption from suit was held to extend to the United States Government and to the government of each state; but, conversely, it was held that an officer of the Government who transcended his power or committed an act colore officii was personally liable. *Meigs* v. *M'Clung*, 9 Cranch 11, 3 L. Ed. 639; *Osborn* v. *Bank of United States*, 9 Wheat. 738, 6 L. Ed. 204; *United States* v. *Lee*, 106 U. S. 196, 27 L. Ed. 171, 1 S. Ct. 240; *Britton* v. *Butler*, 9 Blatchf. 457, Fed. C. No. 1903; Story Agency, Sections 319-B, 320.

Among suits that were brought against officers of the United States Government, to recover for acts alleged to be in violation of law, were suits against Collectors of Customs who had levied taxes upon

It follows that a court having jurisdiction of a suit against a collector of internal revenue can not assume, as did the court in the case of *Second National Bank of Saginaw* v. *Woodworth*, 54 Fed. (2d) 672, that the act of the Collector was within the scope of his authority, for to do so is to beg the very question presented for determination. If the act is within the scope of his authority, he can not be said to be liable, for in that case the exaction must necessarily be held to have been authorized by the sovereign. If it was authorized by the sovereign, unless otherwise unconstitutional, the exaction can not be said to be illegal. If the exaction was not illegal, no recovery can be had.

But aside from this fact, we respectfully submit that the mere relationship of principal and agent does not *per se* give rise to privity in the sense that that term is used in the doctrine of *res judicata*.

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imports alleged to be erroneous and excessive. In such cases they sought the benefit of the rule that a voluntary payment, even if erroneously made, could not be recovered, and that an agent who had collected money for his principal and paid it over to the principal, was not liable to suit even though it should appear that the payment was erroneously made, unless he had been notified not to pay and that a personal claim would be made against him. For this reason it was held that no suit could be maintained against the Collector of Customs to recover duties levied by him in excess of the legal amount, unless he had been notified that the exaction was illegal and that a suit would be brought against him to recover the amount claimed to have been unlawfully demanded. *Elliot* v. *Swartout*, 10 Pet. 137, 9 L. Ed. 373.

At a subsequent period the Parliament of Great Britain and the Congress of the United States passed acts which were designed to remedy this in the common law, and to give to the persons injured by the action of Government officials, within the scope of their authority, a direct remedy against the Government itself. *United States* v. *Lee*, 106 U. S. 196, 205, 27 L. Ed. 171, 176, 1 S. Ct. 240."

Freeman on Judgments is unquestionably one of the most respectable of the authorities on the subject of *res judicata*. Freeman states that although privies are classified as privies in law, privies in blood and privies in estate, all privies are in effect, if not in name, privies in estate.

The subject of privies is discussed in Freeman on Judgments (5 Ed.), Sec. 438, page 958, Vol. 1, and the substance of the discussion is that unless property or rights of property are involved, there is no privity.

It is said:

> "The term privity denotes mutual or successive relationship to the same rights of property. * * *
>
> * * * All privies are in effect, if not in name, privies in estate. They are bound because they have succeeded to some estate or interest, which was bound in the hands of its former owner; and the extent of the estoppel, so far as the privity is concerned, is limited to controversies affecting this estate or interest. * * *
>
> To the extent and only to the extent to which one person has succeeded to an estate or interest formerly held by another can there be privity between them, no matter what were or are their relations to each other or to the same property. * * * There is no privity between husband and wife, or parent and child or other relatives, when neither of them has succeeded to an estate or interest in property formerly held by the other. * * * The same is true of relations created by contract such as master and servant and principal and agent or principal and surety."

This rule is one of universal application.

Allred v. *Smith*, 135 N. C. 443, 65 L. R. A. 924, 47 S. E. 597; *Lipscomb* v. *Postell, et al.*, 38 Miss. 476, 77 Am. Dec. 651; *Downey* v. *Seib*, 185 N. Y. 427, 113 Am. Stat. Rep. 926, 8 L. R. A. (N. S.) 49, 78 N. E. 66; *Hart* v. *Moulton*, 140 Wis. 349, 78 Am. Stat. Rep. 881, 80 N. W. 599; *Old Dominion Copper Mining & Smelting Company* v. *Bigelow*, 203 Mass. 159, 40 L. R. A. (N. S.) 314, 89 N. E. 193, affirmed by this Honorable Court, 225 U. S. 111, 56 L. Ed. 1009, 32 S. Ct. 614.

The corollary of this rule is the rule which this Honorable Court, quoting Freeman on Judgments, expressed in *Dull* v. *Blackman*, 169 U. S. 243, 18 S. Ct. 333, 335, 42 L. Ed. 733, as follows:

> "It is well understood though not usually stated in express terms in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit."

In the case of *Hunt* v. *Havin*, 52 N. H. 162, the court incorporated these two rules into a single definition and stated:

> "A privy is one holding under a party litigant and deriving title subsequent to the commencement of the suit."

If we apply this definition of a privy to the defendant Collector in the instant cause, we find that he does not fall within its terms, since the tax for the years 1921 and 1922 were collected by him more than two years before the commencement of the suit which re-

sulted in the judgment which forms the basis of the plea of *res judicata* herein.

Indubitably, privity in the doctrine of *res judicata* is a rule of property and property rights. It is based upon the ground and solely upon the ground that no one can transfer a greater right than he himself has. This being so, it follows that after a person has divested himself of the title or right or interest, as the case may be, nothing that he can do or suffer after the divesture can affect the rights of the party to whom the property was transferred. By the same token nothing that his transferee does or suffers can affect the transferor.

A few of the many cases that have recognized and applied this doctrine are:

> *Keokuk & Western Railroad* v. *State of Missouri*, 152 U. S. 301, 38 L. Ed. 450, 14 S. Ct. 492; *Campbell* v. *Hall*, 16 N. Y. 575; *Old Colony Trust Company* v. *City of Omaha*, 230 U. S. 100, 57 L. Ed. 410, 419, 33 S. Ct. 967; *Louisville Trust Company* v. *Cincinnati*, 22 C. C. A. 334, 47 U. S. App. 36, 78 Fed. 296; *Keokuk Railroad* v. *Scotland County*, 152 U. S. 318, 322, 14 S. Ct. 605, 38 L. Ed. 457; *Dull* v. *Blackman, supra; Carroll* v. *Goldschmidt*, 33 Fed. (C. C. A. 2) 508, 509; *Norton* v. *San Jose Fruit Packing Company*, 83 Fed. (C. C. A. 9) 512; *Farmers Loan & Trust Company* v. *Meridian Water Works Company, et al.*, 193 Fed. 661, 666; *Wicomico County Commissioners* v. *Bancroft*, 135 Fed. (C. C. A. 4) 977, 980; *Illinois Trust & Savings Bank* v. *City of Des Moines*, 224 Fed. 620, 622; *Postal Telegram & Cable Company* v. *City of Newport, Kentucky*, 247 U. S. 464, 62 L. Ed. 1215, 38 S. Ct. 566.

SUMMARY.

In summarizing the facts and the law in this suit we first say that the case must be judged by its possibilities at its commencement. See *Smietanka* vs. *Indiana Steel Co.*, 257 U. S. 1, 42 S. Ct. 1, 66 L. Ed. 99, where the suit against the defendant collector was dismissed even although a certificate of probable cause had been issued, thereby converting the claim into one against the United States. And compare *Second National Bank of Saginaw* vs. *Woodworth*, 54 Fed. (2) 672, where it was held that privity existed only because no reason to deny a certificate of probable cause appeared.

With this first proposition before us we find that the cause of action against the defendant Collector is based solely upon the assumption that he transcended his authority when he exacted the tax sought to be recovered; that his authority to collect any tax whatsoever depended upon the statute which he was administering when he made the exaction; that the statute did not authorize the exaction, hence, to the extent that he exacted more than the statute prescribed, he transcended his authority and incurred a personal liability. Certainly this constitutes the sum and substance of the issues joined.

What was the proof to establish the issue? Only a judgment rendered in a proceeding to which the defendant was not a party; a proceeding had before the Board of Tax Appeals, a tribunal that is designated by statute as an independent branch of the Executive Department, that has only special and limited jurisdic-

tion; a proceeding in which the defendant could not have appeared even had he so desired; and which was begun several years after the act complained of had been committed.

The tax for the years 1921 and 1922 was collected not later than December 15, 1923. The liability of the defendant collector was incurred, if at all, only by making the collection. His interest in the property which is the subject of this suit arose not later than December 15, 1923. Since the suit, which resulted in the judgment that was received as conclusive evidence against the defendant, was commenced before the Board of Tax Appeals, and that Board did not come into existence until after June 2, 1924, it follows that the interests of the defendant in the property here involved arose prior to the commencement of the suit pleaded in bar and he cannot, therefore, be said to be privy to the judgment.

Conclusion.

The decision of the court below is erroneous and should be reversed.

Respectfully submitted,

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